

**GANDA SELAT SDN BHD (IN LIQUIDATION)
v. MPDT CAPITAL BHD**

HIGH COURT MALAYA, SHAH ALAM
FAIZAH JAMALUDIN J
[ORIGINATING SUMMONS NO: BA-24NCVC-1459-12-2020]
27 SEPTEMBER 2021

Abstract – *The powers of a liquidator are set out in the Twelfth Schedule and s. 486 of the Companies Act 2016. After a company has been wound up, only the liquidator has the power to bring or defend any legal proceeding in the name and on behalf of the company.*

CIVIL PROCEDURE: *Jurisdiction – Company law – Company wound up and liquidator appointed – Company entered into joint venture agreement ('JVA') with 'white knight' for white knight to take over and complete development project – White knight filed originating summons seeking declarations that JVA valid and specific performance for company to deliver project – High Court allowed OS – Whether High Court seized with jurisdiction to hear OS and make order – Whether order made by High Court consistent with Companies Act 2016, Housing Development (Control and Licensing) Act 1966 and Housing Development (Control and Licensing) Regulations 1989*

COMPANY LAW: *Winding-up – Liquidator – Power to bring or defend legal proceedings in the name and on behalf of company – Company wound up and liquidator appointed – Company entered into joint venture agreement ('JVA') with 'white knight' for white knight to take over and complete development project – White knight filed originating summons ('OS') seeking declarations that JVA valid and specific performance for company to deliver project – Whether liquidator informed about and served with OS – Whether OS and order consistent with s. 486 and Twelfth Schedule of Companies Act 2016 – Whether order void and ought to be set aside*

The plaintiff was the developer of Sg Chinchin Residensi ('project'), a 20-storey condominium consisting of 350 units of housing accommodation where 149 units had been sold. The project was later declared by the Ministry of Housing and Local Government ('Ministry') as an abandoned project. The purchasers of the units filed a winding-up petition at the High Court ('insolvency court') to wind up the plaintiff. Upon the plaintiff's application for the appointment of a judicial manager, the insolvency court made a judicial management order ('JMO'), appointing a judicial manager ('JM') for the plaintiff and, following the JMO, the winding-up petition was stayed. However, the JM later applied to the insolvency court to discharge himself and the application was allowed; the JMO was discharged. The plaintiff was wound up and a liquidator was appointed. Although the JM rejected the defendant's proposal to rehabilitate the plaintiff, unbeknownst to

A the petitioners and the JM, the plaintiff entered into a joint venture agreement ('JVA') with the defendant, referred to in the JVA as the white knight. The objective of the JVA was to allow the defendant to take over and complete the development on as is where is basis and, at the same time, complete the land owners' units and deliver vacant possession of the sold units. The plaintiff and the defendant further agreed to terminate the JM.

B After the plaintiff was wound up, the defendant filed originating summons ('OS 725') at the High Court, seeking (i) declarations that the JVA was valid and/or not void and that the defendant had an interest on the land; (ii) specific performance for the plaintiff to deliver the project to the defendant and to allow the defendant to proceed with the development of the project. The High Court allowed OS 725 and granted: (i) an order of specific performance for the plaintiff to deliver the project to the defendant and to allow the defendant to continue with the development of the project; and (ii) a declaration that the JVA was valid and/or not void and that the defendant had an interest in the land ('order'). Hence, the present application

C by the liquidator to set aside the order in OS 725. The issues that arose for determination were: and (i) whether the order was made in breach of the Companies Act 2016 ('CA'), the Housing Development (Control and Licensing) Act 1966 ('HDA') and the Housing Development (Control and Licensing) Regulations 1989; and (ii) whether the High Court in OS 725 was seized with the jurisdiction to hear OS 725 and to make the order.

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Held (allowing application; setting aside order):

- (1) The powers of a liquidator, where a company has been wound up, are set out in the Twelfth Schedule and s. 486 of the CA. After the plaintiff had been wound up by the insolvency court, pursuant to s. 486 and the Twelfth Schedule of the CA, only the liquidator had the power to bring or defend any legal proceedings in the name and on behalf of the plaintiff. The defendant, when it filed its application in OS 725, knew the existence of the winding-up petition, which could be seen from their letter to the plaintiff where the defendant objected to the plaintiff's application of the JM. OS 725 was filed by the defendant on 28 July 2020 after the winding-up order was given by the insolvency court and the order was granted after the plaintiff had been wound up and the liquidator appointed. However, the defendant brought OS 725 against the plaintiff without informing or serving the OS on the liquidator. Therefore, both the OS and the order were made in breach of s. 486 and the Twelfth Schedule of the CA. The order could be declared as void and be set aside. (paras 34-36, 38, 47 & 48)
- (2) The JVA was entered into between the defendant and the plaintiff during the period when the plaintiff was under the administration of the JM appointed by the insolvency court pursuant to the JMO. During the period when the JMO was in force, the directors of the plaintiff were *functus officio*; they did not have the capacity to enter into the JCA on

behalf of the plaintiff. Under s. 414(2) of the CA, all powers conferred and duties imposed on the plaintiff by the CA, or by the constitution of the plaintiff, shall be exercised and performed by the JM and not the directors. Section 405(3) of the CA further stipulates that during the period when the JMO is in force, 'the affairs, business and property' shall be managed by the JM appointed by the court. As the directors of the plaintiff did not have the legal capacity to enter into the JVA during the period of the JMO, the JVA was invalid. The JVA was entered into in breach of the express provisions of ss. 405(3) and 414(2) of the CA. (paras 49, 51, 52, 53 & 56)

- (3) It was evident from the terms of the JVA that the plaintiff had disposed of its 'property' to the defendant. Section 472(1) of the CA prohibits the disposition of the property of the company, except for a disposition ordered by the court or made by a liquidator or an interim liquidator in exercise of the power conferred on him by the CA or the order of the court. Furthermore, the plaintiff did not own the land. The plaintiff's 'property' was its right to develop the land, construct the units for the project and to sell these units pursuant to the joint venture agreement which the plaintiff had entered into with the registered owners of the land. The plaintiff's disposal of its property to the defendant, pursuant to the JVA, amounted to a disposition of the property of the company after the presentation of the winding-up petition, without the leave of the insolvency court, in contravention of s. 472(1) of the CA and, accordingly, was void. (paras 57, 65 & 67)
- (4) The JVA was void because of the undue preference, pursuant to s. 528 of the CA, given to the directors of the plaintiff. Under cl. 22 of the JVA, the plaintiff was to be paid the sum of RM30,000 per month for its maintenance during the completion of the process of 30 months. However, instead of the plaintiff receiving the RM30,000 per month from the defendant, the directors of the plaintiff would also be personally allocated 15% of the profits of the development or eight units based on the price of RM400,000 per unit. The payments and the profit share to the directors of the plaintiff contravened the statutory insolvency regime under s. 527 of the CA. (paras 68-73)
- (5) The terms of the JVA, particularly in cls. 10, 15, 18 and 19 amounted to an agreement between the plaintiff and the defendant for the plaintiff 'to sell, transfer, assign, dispose of or reconstruct his business or management relating to housing development either by amalgamation or otherwise'. The JVA was in breach of the HDA given that (i) the plaintiff did not notify the Controller of Housing of the proposed JVA with the defendant; (ii) the plaintiff did not seek for and obtain the approval of the Controller of Housing prior to entering into the JVA with the defendant; and (iii) the defendant was not a housing developer duly licensed under the HDA. (paras 75 & 80)

A Case(s) referred to:

Azabar Holdings Sdn Bhd v. Kumarappan KM Palaniappan & Anor [2021] 6 CLJ 240 CA (refd)

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC (refd)

Dubon Bhd v. Wisma Cosway Management Corporation [2020] 6 CLJ 589 FC (refd)

B *Eu Finance Bhd v. Lim Yoke Foo [1982] 1 LNS 21 FC (refd)*

Harkness v. Bells' Asbestos and Engineering Ltd [1967] 2 QB 729 (refd)

Hock Hua Bank Bhd v. Sahari Murid [1980] 1 LNS 92 FC (refd)

Isaacs v. Robertson [1985] AC 97 (refd)

Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd; Bhagat Singh Surain Singh & Ors (Intervenors) [1996] 4 CLJ 52 HC (refd)

C *Lai King Lung & Anor v. Merais Sdn Bhd [2020] 9 CLJ 449 FC (refd)*

Pioneer Haven Sdn Bhd v. Ho Hup Construction Company Bhd & Anor And Other Appeals [2012] 5 CLJ 169 CA (refd)

Teoh Ah Mooi v. Causeway Bay Plantations Sdn Bhd [2014] 5 CLJ 466 CA (refd)

Legislation referred to:

D Companies Act 1965, ss. 132C, 223, 226(3), 236(2)(a), (3), 292, 293

Companies Act 2016, ss. 2, 223, 405(3), 411(4), 414(2), 471(1), (2), 472(1), 486, 527, 528, Twelfth Schedule

Housing Development (Control and Licensing) Act 1966, ss. 5(1), 8(1), (2)

For the plaintiff - Muhammad Toriq Abd Manaf; M/s Toriq Seth & Partners

E *For the defendant - Mohd Khairul Abdullah; M/s Hafiz Zabir & Rezal*

Reported by Najib Tamby

JUDGMENT

F Faizah Jamaludin J:

Introduction

G [1] This is an application by the liquidator of the plaintiff, Ganda Selat Sdn Bhd (in liquidation) to set aside an order made by the Shah Alam High Court in Originating Summons No. BA-24NCVC-725-07-2020 ("OS 725") on 28 July 2020.

[2] This court allowed the plaintiff's application and has set aside the order in OS 725.

H [3] OS 725 was filed by the defendant against the wound up company (as defined below) without leave of the insolvency court (as defined below) in contravention of s. 471(1) of the Companies Act 2016. Without the prior leave of the insolvency court, the Shah Alam High Court lacked the jurisdiction to hear the defendant's action against the company in OS 725.

I [4] Furthermore, this court found, among others, that the JVA between the defendant and the company, contravened both the Companies Act 2016 and the Housing Development (Control and Licensing) Act 1966. Also, the directors of the company lacked the legal capacity to enter into the JVA,

since the company was under a judicial management order at the time the JVA was executed between the defendant and the directors of the company without the knowledge and consent of the judicial manager.

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[5] Crucially, there was undue preference in favour of the directors of the company in the JVA. Such undue preference contravenes the most fundamental principle of insolvency law (codified in s. 528 of the Companies Act 2016); thus, rendering the JVA fraudulent and void.

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[6] These findings and others discussed in this judgment mean that the order made by the Shah Alam High Court in OS 725 was defective and was null and void on the grounds of illegality.

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[7] The full grounds for this court's decision in setting aside the order in OS 725 are set out in this judgment.

Background Facts

[8] Ganda Selat Sdn Bhd ("the company") is the developer of Sg Chinchin Residensi ("the project"), a 20-storey condominium consisting of 350 units of housing accommodation, where 149 apartment units have been sold.

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[9] The project was declared as an abandoned project by the Kementerian Perumahan dan Kerajaan Tempatan ("Ministry of Housing") on 10 November 2017.

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[10] The purchasers of the apartment units filed a Winding-Up Petition No. WA-28NCC-216-03-2019 ("winding-up petition") at the Kuala Lumpur High Court ("the insolvency court") on 12 March 2019 to wind up the company.

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[11] On the company's *ex parte* application for the appointment of a judicial manager, the insolvency court in WA-28JM-3-07-2019 made a judicial management order on 21 January 2020 ("JMO") appointing Ong Kong Lai as a judicial manager of the company ("the JM"). With the granting of the JMO, the winding-up petition was stayed.

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[12] On 5 March 2020, the JM applied to the insolvency court to discharge himself as judicial manager of the company because (i) the company did not pay the JM's fees; (ii) although the JM had held meetings with the directors of the company on 21 January 2020 and 4 February 2020 but the directors could not give any accounts and documents to the JM to enable him to undertake his duties; and (iii) there was no prospect that the purpose/objective of the JMO would be achieved.

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[13] In his affidavit in support, the JM said one of the directors, Encik Ahmad bin Bakar, only gave him a letter from the defendant dated 22 January 2020 that suggested rehabilitation of the company. The JM averred that after considering the letter and its terms, he told Encik Ahmad that the defendant's proposal was not in accordance with the JMO and should be rejected.

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- A [14] The insolvency court allowed the JM’s application and made the order to discharge the JMO on 19 June 2020 (“JMO discharge order”).
- [15] On 14 July 2020, the insolvency court in the winding-up petition delivered the following unless order:
- B MAKA ADALAH DIPERINTAHKAN menurut s. 469(1) Akta Syarikat 2016 bahawa kecuali (unless) jika pihak Pempetisyen-Pempetisyen dan Responden berjaya mendapatkan penyelesaian luar mahkamah pada atau sebelum 25.8.2020, prayer-prayer perintah penggulungan syarikat sepertimana yang dipohon menurut Petisyen bertarikh 12.3.2019 (Lampiran 2) adalah dibenarkan dan berkuatkuasa pada 14.7.2020. Prayer-prayer tersebut adalah sepertimana yang dinyatakan di bawah:
- C (a) Ganda Selat Sdn Bhd (No. Syarikat 591350-P) digulungkan oleh Mahkamah yang Mulia ini di bawah peruntukan Seksyen 465(1)(e) and 466(1)(a) Akta Syarikat 2016;
- D (b) Augustine A/L T.K. James (No. KP: 570902-10-6061) dari Tetuan Zakaria Augustine Kang Consultancy Sdn Bhd dilantik sebagai Pelikuidasi; dan
- (c) Kos Pempetisyen dibayar dari aset-aset Ganda Selat Sdn Bhd (No. Syarikat 591350-P).
- E [16] The company was wound up on 14 July 2020 and Augustine a/1 TK James was appointed as the liquidator of the company (“the liquidator”).
- [17] Although the JM had rejected the defendant’s proposal to rehabilitate the company in its letter dated 22 January 2020, unbeknownst to the petitioners and the JM, the company entered into a joint venture agreement on 20 March 2020 (“the JVA”) with the defendant, referred to in the JVA as “the white knight”. The objective of the JVA can be seen in cl. 13 which reads:
- F 13. The Developers is entering into this New JVA with the White Knight to allow the White Knight to take over and complete the development on as is where is basis and at the same time complete the Land Owners units and deliver vacant possession of the Sold Units upon terms and conditions contained in the New JVA.
- G [18] The company and the defendant in cl. 20(g) of the JVA agreed to terminate the JM “as soon as possible as the existence of the judicial manager will impede the planned progress of takeover by the white knight”.
- H [19] After the company was wound up, on 28 July 2020, the defendant filed OS 725 in the Shah Alam High Court seeking declarations that the JVA is valid and/or not void and that the defendant has an interest on the said land; and specific performance for the company to deliver the project to the defendant and to allow the defendant to proceed with the development of the project.
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[20] The Shah Alam High Court granted the defendant's application in OS 725 on 19 August 2020. In OS 725, the defendant is referred to as "plaintiff" and the company is referred as "defendan".

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[21] The order in OS 725 reads as follows:

1. Satu perintah dekri pelaksanaan spesifik terhadap Defendan dan/atau wakil/pemegang kepentingan Defendan untuk menyerahkan projek pembangunan atas nama Sungai Chinchin Residensi yang dimajukan di atas hartanah GM1787, Lot 1450 dan GM115, Lot 1295, Mukim Setapak, Daerah Gombak, Negeri Selangor Darul Ehsan kepada Plaintiff dan/atau wakil/pemegang kepentingan Plaintiff;

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2. Satu perintah dekri pelaksanaan spesifik terhadap Defendan dan/atau wakil/pemegang kepentingan Defendan untuk membenarkan Plaintiff dan/atau wakil pemegang kepentingan Plaintiff untuk meneruskan pembangunan pada projek Sungai Chinchin Residensi yang dimajukan di atas hartanah GM1787, Lot 1450 dan GM115, Lot 1295, Mukim Setapak, Daerah Gombak, Negeri Selangor Darul Ehsan;

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3. Satu deklarasi bahawa Perjanjian Usahasama yang dimasuki oleh Plaintiff dan Defendan pada 30hb Mac 2020 adalah satu Perjanjian yang sah dan/atau tidak terbatal;

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4. Satu deklarasi bahawa Plaintiff dan/atau wakil pemegang kepentingan Plaintiff adalah mempunyai kepentingan pada dan/atau atas hartanah GM1787, Lot 1450 dan GM115, Lot 1295, Mukim Setapak, Daerah Gombak, Negeri Selangor Darul Ehsan;

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5. Tidak ada sebarang perintah terhadap kos.

[22] Pursuant to the order in OS 725, the Shah Alam High Court granted:

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(i) an order of specific performance for the company, (i) to deliver the project to the defendant, and (ii) to allow the defendant to continue with the development of the project; and

(ii) a declaration that the JVA is valid and/or not void, and (b) the defendant has interest in the land.

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[23] The liquidator, in the name and on behalf of the company, filed this instant application to set aside the order in OS 725 because the order was made in breach of the Companies Act 2016 ("CA 2016"), Housing Development (Control and Licensing) Act 1966 ("HDA"), and the Housing Development (Control and Licensing) Regulations 1989 ("HDA Regulations").

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Law On Setting Aside Judgments/Orders Of Court

[24] The order in OS 725 was a final order made by the Shah Alam High Court, which is of concurrent jurisdiction with this court. The general rule is that one High Court cannot set aside a final order regularly obtained from

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- A another High Court of concurrent jurisdiction: see the Federal Court's decision in *Hock Hua Bank Bhd v. Sahari Murid* [1980] 1 LNS 92; [1981] 1 MLJ 143.
- B [25] The only exception to this general rule is that a final order or judgment of a High Court can be set aside by another High Court of concurrent jurisdiction where it can be proved that the final order or judgment of the first High Court is null and void on the ground of illegality or lack of jurisdiction.
- C [26] The Federal Court in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 AMR 909; [1998] 1 MLJ 393, FC, ("*Badiaddin v. Arab Malaysian Finance*") held that where an order of court is made in contravention of any written law, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose.
- D [27] Mohd Azmi FCJ in his judgment in *Badiaddin v. Arab Malaysian Finance* cited the *dicta* of Lord Diplock in the Privy Council case of *Isaacs v. Robertson* [1985] AC 97, Abdoolcader J (as he then was) in *Eu Finance Bhd v. Lim Yoke Foo* [1982] 1 LNS 21; [1982] 2 MLJ 37 and Diplock LJ (as he then was) in the English case of *Harkness v. Bells' Asbestos and Engineering Ltd* [1967] 2 QB 729:
- E It is of course settled law as laid down by the Federal Court in *Hock Hua Bank* case [*Hock Hua Bank v. Sahari Murid* [1980] 1 LNS 92; [1981] 1 MLJ 143] that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule (which was not in issue and therefore not discussed in *Hock Hua Bank*) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction
- F so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v. Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court "... which a person affected by the order is entitled to apply to have set aside
- G *ex debito justitiae* in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make".
- H The Privy Council through Lord Diplock also emphasised that the courts in England have not closed the door as to the type of defects in the final judgment of the court that can be brought into the category that attracts *ex debito justitiae* the right to have it set aside without going into the appeal procedure, "save that specifically it includes orders that have been obtained in breach of rules of natural justice". Similarly, in this country
- I the statement of Abdoolcader J (as he then was) in *Eu Finance Bhd v. Lim Yoke Foo* [1982] 1 LNS 21; [1982] 2 MLJ 37 @ 39 provides the correct guideline on the subject:

The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon – in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent. In *Harkness v. Bells' Asbestos and Engineering Ltd.* [1967] 2 QB 729, 736 Lord Diplock LJ (now a Law Lord) said (at p. 736) that “it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside”.

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[28] Mohd Azmi FCJ went on to hold that for the superior courts to set aside an order of court which contravened “any written law”, the contravention should be one which defies a substantive statutory prohibition to render the order of court null and void on the ground of illegality or lack of jurisdiction and the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. His Lordship said:

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For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the Superior Courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened “any written law”, **the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction.** It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where **the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice.** In all cases the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

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(emphasis added)

[29] Further, in *Badiaddin v. Arab Malaysian Finance*, Gopal Sri Ram JCA held:

But **where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose.** It is then entirely open to the court, upon the illegality being clearly shown, to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal.

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- A It is therefore clear, in light of the principles established by high authority, that **a court of unlimited jurisdiction, even in the absence of an express enabling provision, has inherent power to set aside its orders made in breach of written law**. The ends of justice will not be met if such a power did not exist. And the procedural branch of the broad and flexible doctrine of estoppel known as *res judicata* finds no place in such a circumstance.
- B Neither has the *functus officio* theory, which, upon close examination is merely part and parcel of the doctrine of *res judicata*, any role to play in the case.

(emphasis added)

C **Analysis And Finding Of Court**

- [30] In determining the plaintiff's application to set aside the order in OS 725, this court must decide whether the order in OS 725 had contravened the CA 2016 and/or the HDA and/or the HDA Regulations. It must also decide whether the High Court in OS 725 had the jurisdiction to hear OS 725 and make the order.

- D [31] If the order in OS 725 had contravened any or all these written laws, following *Badiaddin v. Arab Malaysian Finance*, the High Court had made the order without jurisdiction. The order is hence, rendered null and void and should be set aside.

- E [32] In this instant case, the plaintiff was not served with the order in OS 725. The plaintiff only found out about the order in OS 725 when it was informed of the order by the Ministry of Housing in a letter dated 21 October 2020 that the Ministry had received a letter from the defendant informing the Ministry that the defendant's JVA with the company had been completed on 20 March 2020 and the High Court order in OS 725 declaring that the JVA is valid for purposes of the development of the project.

- F [33] The Court of Appeal in *Teoh Ah Mooi v. Causeway Bay Plantations Sdn Bhd* [2014] 5 CLJ 466; [2014] 1 MLJ 263, CA following *Badiaddin v. Arab Malaysian Finance Bhd* and *Eu Finance Bhd v. Lim Yoke Foo (supra)* held that
- G where an order of court is a nullity, an application to set aside can be made at any time. In *Teoh Ah Mooi (supra)*, a judgment in default was obtained in June 1999 against an undischarged bankrupt. The application to set aside the judgment was made more than 12 years later in January 2012 – the Court of Appeal allowed the application and set aside the judgment in default as
- H being a nullity.

Is The Order In OS 725 In Breach Of The CA 2016?

- I [34] It is not disputed that OS 725 was filed by the defendant at the Shah Alam High Court on 28 July 2020 after the winding-up order was given by the insolvency court on 14 July 2020, and that the order in OS 725 was granted after the company had been wound-up and the liquidator appointed.

[35] The powers of a liquidator where a company has been wound up is set out in the Twelfth Schedule and s. 486 of the CA 2016. A

[36] After the company has been wound-up by the insolvency court, pursuant to s. 486 and the Twelfth Schedule of the CA 2016, only the liquidator has the power to bring or defend any legal proceedings in the name and on behalf of the company. Section 486 of the CA 2016 reads as follows: B

486. Powers of liquidator in winding up by court

(1) Where a company is being wound up by the court, the liquidator may:

- (a) without the authority under paragraph (b), exercise any of the general powers specified in Part I of the Twelfth Schedule; and C
- (b) with the authority of the court or the committee of inspection, exercise any of the powers specified in Part II of the Twelfth Schedule.

(2) The exercise by the liquidator in a winding up by the court of the powers conferred by this section is subject to the control of the court and any creditor or contributory may apply to the court with respect to any exercise or proposed exercise of any of those powers. D

[37] One of the powers of the liquidator specified in Part I of the Twelfth Schedule at para. (a) is that the liquidator “bring or defend any action or other legal proceedings in the name and on behalf of the company”. E

[38] The defendant, when it filed its application in OS 725, knew the existence of the winding-up petition, which can be seen from their letter to the company, where the defendant objected to the company’s application of the JM. However, the defendant brought OS 725 against the company without informing or serving the OS on the liquidator. F

[39] As held by the Federal Court in *Lai King Lung & Anor v. Merals Sdn Bhd* [2020] 9 CLJ 449, once “a company is wound up by an order of court, the board of directors becomes *functus officio*. The management of the company is vested in the liquidator. Only the liquidator has the power under the 2016 Act to bring or defend any action or other legal proceedings in the name and on behalf of the company.” G

[40] Vernon Ong Lam Kiat FCJ explained that “there are two different and distinct fact situations under which leave of the court or sanction of the liquidator is required” in respect of legal proceedings by or against a wound-up company, namely: H

- (i) actions or proceedings against a wound-up company.

Such actions are governed by s. 226(3) of the Companies Act 1965 (“CA 1965”) or s. 471(1) of the CA 2016 which provides that leave of court is necessary in order for any action or proceeding proceeded with or commenced against a wound-up company; and I

A (ii) actions or proceedings by a wound-up company.

Such actions are governed by s. 236(2)(a) and 236(3) of the CA 1965 or s. 486 of the CA 2016 read together with Part I of the Twelfth Schedule which requires the sanction of the liquidator to be obtained.

B [41] The Federal Court in *Lai King Lung & Anor v. Merais Sdn Bhd* explained:

[20] Similarly, if a company is wound up by an order of court, the board of directors becomes *functus officio*. The management of the company is vested in the liquidator. Only the liquidator has the power under the 2016 Act to bring or defend any action or other legal proceedings in the name and on behalf of the company. A creditor or contributory cannot commence or continue with any action in the name of the wound-up company. Accordingly, if a creditor or contributory of the wound up company wishes to bring or proceed with an action, the creditor or contributory must apply to the liquidator for his sanction to do so. In order to ensure that the defendant is not prejudiced in the event that the wound-up company's action is dismissed, the liquidators usually impose conditions (such as indemnities and guarantees) which must be satisfied by the creditor or contributory, as the case may be, before the sanction is given.

[21] At the outset, it is important to appreciate that there are two different and distinct fact situations under which leave of the court or sanction of the liquidator is required. The first is in respect of action or proceeding against a wound-up company. This situation is governed by s. 226(3) of the 1965 Act/s. 471(1) of the 2016 Act which provides that leave of court is necessary in order for any action or proceeding proceeded with or commenced against a wound-up company. The second scenario is where action or proceeding is taken by a wound-up company: s. 236(2)(a) & 236(3) of the 1965 Act/s. 486 of the 2016 Act read together with Part I of the Twelfth Schedule which requires the sanction of the liquidator to be obtained. The factual matrix in this appeal falls under the latter scenario.

G [42] OS 725 is the defendant's action against the company. Section 471 of the CA 2016 states that no action or proceedings can be proceeded with or commenced against a company that has been wound-up pursuant to a winding-up order by a court, except with the leave of the insolvency court being the court that granted the winding-up order.

H [43] The application for leave must be served on the liquidator. Section 471 of the CA 2016 states:

(1) When a winding up order has been made or an interim liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and in accordance with such terms as the court imposes.

I

(2) The application for leave under subsection (1) shall be made in the court granting the winding up order and shall be served on the liquidator.

A

(3) The office copy of the order for leave under subsection (1) shall be lodged by the applicant referred to in subsection 470(1) with the Registrar and with the Official Receiver within fourteen days from the making of the order.

B

[44] In this case, the defendant commenced OS 725 after the winding-up order was made by the insolvency court against the company, without the leave of the insolvency court.

[45] The defendant filed OS 725 in the Shah Alam High Court and did not seek leave of the insolvency court prior to filing OS 725, which is in contravention of ss. 471(1) and 471(2) of the CA 2016. As no application for leave of court was made prior to the filing of OS 725, it follows that no application for leave was served on the liquidator in breach of s. 471(1) of the CA 2016.

C

[46] Although the same firm of solicitors was acting for the company in the winding-up petition and in OS 725, they did not inform the Shah Alam High Court in OS 725 that the insolvency court had granted the winding-up order on 14 July 2020 prior to the filing of OS 725 on 28 July 2020 and the granting of the order in OS 725 on 19 August 2020.

D

[47] Both OS 725 and the order of court made in OS 725 were made in breach of s. 486 and the Twelfth Schedule of the CA 2016 since the company was already wound-up when OS 725 was filed, and the defendant failed to obtain the leave of the insolvency court prior to the filing of OS 725.

E

[48] Hence, pursuant to the Federal Court's decision in *Badiaddin v. Arab Malaysian Finance (supra)*, this court can declare that the order in OS 725 as being void and set it aside.

F

Did The Directors Of The Company Have The Legal Capacity To Enter Into The JVA? Was The JVA In Contravention Of The CA 2016?

G

[49] The JVA was entered between the defendant and the company on 20 March 2020, which was the period when the company was under the administration of the JM appointed by the insolvency court pursuant to the JMO.

[50] Learned counsel for the defendant submits that as s. 411(4) of the CA 2016 does not permit any resolution to be passed or any order made for the winding up of the company, the JVA is valid since it was entered within the period where the company has yet to be wound up.

H

[51] With respect to learned counsel for the defendant, during the period the JMO is in force, the directors of the company are *functus officio*. They do not have the capacity to enter into the JVA on behalf of the company.

I

- A [52] Under s. 414(2) of the CA 2016, all powers conferred, and duties imposed on the company by the CA 2016 or by the constitution of the company, shall be exercised and performed by the JM and not by the directors.
- B [53] Section 405(3) of the CA 2016 stipulates during the period in which the JMO is in force, “the affairs, business and property” shall be managed by the JM appointed by the court.
- C [54] The affidavit evidence shows that the defendant had asked the company not to proceed with the appointment of the JM. The deponent of the defendant’s affidavit, Nik Zamri Majid, in a letter from the defendant to the company dated 22 January 2020 had stated “It is of utmost important (*sic*) that you do not proceed with the application to court to appoint managers in Litigation WA-28JM-3-07-2019 as such appointment will complicate the process of rehabilitation.”
- D [55] In cl. 20(g) of the JVA, the defendant and the company expressly agreed to terminate the appointment of the JM as soon as possible “as the existence of the JM will impede the planned progress of takeover of by the White Knight”. The defendant is referred to in the JVA as “the White Knight”.
- E [56] Accordingly, as the directors of the company did not have the legal capacity to enter into the JVA during the period of the JMO, the JVA is invalid. Furthermore, the JVA was entered in breach of the express provisions of ss. 405(3) and 414(2) of CA 2016.
- F *Is The JVA A Disposition Within The Meaning Of Section 472(1) Of CA 2016?*
- [57] Section 472(1) of CA 2016 prohibits the disposition of the property of the company, except for a disposition ordered by court or made by a liquidator or an interim liquidator in exercise of the power conferred on him by the CA 2016 or the order of court. Section 472(1) of CA 2016 reads:
- G **472. Avoidance of dispositions of property or certain attachment, etc**
 (1) Any disposition of the property of the company, other than an exempt disposition, including any transfer of shares or alteration in the status of the members of the company made after the presentation of the winding up petition shall, unless the court otherwise orders, be void.
- H [58] The defendant argues that the JVA was not a disposition within the meaning of s. 472(1) of CA 2016. To support its argument, learned counsel for the defendant quoted a passage in Zainun Ali JCA’s (as she then was) judgment in *Pioneer Haven Sdn Bhd v. Ho Hup Construction Company Bhd & Anor And Other Appeals* [2012] 5 CLJ 169; [2012] 3 MLJ 616; [2013] 3 AMR
- I 297 (“*Pioneer Haven*”).

[59] With respect to learned counsel for the defendant, this court is not able to agree with him. Contrary to his submission, the Court of Appeal in *Pioneer Haven* did not decide that all joint venture agreements do not constitute a disposal within the meaning of s. 132C of CA 1965 (currently s. 223 of CA 2016). Instead, the Court of Appeal upon examining the provisions of the joint development agreement (“JDA”) between Pioneer Haven Sdn Bhd and Bukit Jalil Development, noted that it is “common ground that Bukit Jalil is and continues to be the legal and beneficial owner of the land. There is no transfer of ownership of the land to Pioneer Haven, whether pursuant to the JDA or otherwise”, and concluded that the JDA was for the joint development of the land by Pioneer Haven and a division of the profits therefrom between Pioneer Haven and Bukit Jalil as land owners.

[60] Furthermore, the mischief that s. 132C of CA 1965 (now s. 223 of CA 2016) is trying to avoid is different from the mischief that s. 472(1) of CA 2016 (previously s. 223 of CA 1965) is trying to avoid. Section 132C of CA 1965 reads:

132C. Approval of company required for disposal by directors of company’s undertaking or property

(1) Notwithstanding anything in the memorandum or articles of association of the company, the directors shall not carry into effect any arrangement or transaction for:

- (a) the acquisition of an undertaking or property of a substantial value; or
- (b) the disposal of a substantial portion of the company’s undertaking or property, unless the arrangement or transaction has been approved by the company in a general meeting.

[61] In *Pioneer Haven*, the Court of Appeal held that “the mischief which s. 132C was enacted to prohibit, was the parting by the company of any of its substantial assets without approval of the shareholders at general meeting”. Zainun Ali JCA (as she then was) said:

[114] One might ask: what is the mischief which s. 132C seeks to avoid? Reading the said section as a whole, it is clear that the mischief which s. 132C was enacted to prohibit, was the parting by the company of any of its substantial assets without approval of the shareholders at general meeting. Section 132C makes it incumbent upon the directors and the company to inform the shareholders of any intention to carry into effect any transaction whereby any substantial assets of the company was to be taken out of the company. This duty is indirectly imposed by requiring shareholders’ approval before such transaction is carried into effect. The whole objective of s. 132C is designed to protect the interest of the company itself (in this case, Bukit Jalil) and not the interest of a shareholder, such as Ho Hup.

- A [62] Whereas the mischief that s. 472(1) of CA 2016 (formerly s. 223 of CA 1965) was enacted to prohibit, is the disposal of the company's property after the presentation of a winding-up petition and to safeguard the assets of an insolvent company for the benefit of its creditors.
- B [63] The Court of Appeal in *Azabar Holdings Sdn Bhd v. Kumarappan KM Palaniappan & Anor* [2021] 6 CLJ 240 at para. [30] held that "the jurisprudence established by case laws under s. 223 of the CA 1965 applies to s. 472 of the CA 2016." The Court of Appeal held:
- C [33] On the issue of disposition of property after the commencement of winding-up proceedings, *it is settled law that the transfer of any property belonging to a company after the commencement of winding up proceedings against it, is void if it does not comply with s. 223 of the CA 1965.*
- D [34] The starting point is the seminal case of *Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 1 LNS 44; [1987] 1 MLRA 672; [1988] 2 MLJ 449 (SC) ("*Lian Keow's case*").
- E [35] In that case, the Supreme Court held that a transfer of land which was registered after the commencement of winding up was void, even though the actual transfer documents had been executed prior to the commencement of winding up ...
- E [36] In *Chai Yen Chong & Ors v. Shencourt Properties Sdn Bhd & Ors* [2012] 1 LNS 591; [2013] 1 MLRA 468 (CA), parcels of land belonging to the company were transferred after winding-up proceedings were commenced against the company. The Court of Appeal agreed with the High Court's decision that the transfer was void as being in contravention of s. 223 of the CA 1965 ... (emphasis added)
- F [64] "Property" is defined in s. 2 of CA 2016 as:
- G "property", in relation to a corporation, includes land, money, goods, chose in action, things in action, goodwill and every valuable thing, whether corporeal or incorporeal, movable or immovable, and whether situated in Malaysia or elsewhere and also includes obligations, servitudes, and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to the property;
- H [65] In this instant case, the company does not own the land. The company's "property" is its right to develop the land, construct the apartment units for the project and sell the apartment units, pursuant to the joint venture agreement dated 17 August 2007 the company had entered with the registered owners of the land.
- I [66] It is evident from the terms of the JVA that the company had disposed of its "property" to the defendant. Pursuant to the JVA, the company had handed over the total management of the project to the defendant in terms of the construction of the project as well as revenue management including sales of the unsold units of apartment and expressly agreed in cl. 15 to "not to interfere in any aspect of the management" of the development. This is evident from:

- (i) clause 10 of the JVA, where it is stated that “the developers (the company) are desirous in having the White Knight (the defendant) take over and complete the whole project as the developers are no longer solvent and unable to proceed with project”; A
- (ii) clause 12, where the defendant a special purpose vehicle (SPV) to undertake the completion of the development; B
- (iii) clause 15, where the company agrees on the completion of the JVA to hand over the total management of the development of the project to the defendant and “not to interfere in any aspect of the management” of the development; C
- (iv) clause 18, where the company affirms that the defendant is entrusted and authorised “in every aspect of the development to manage, complete, sell the unsold units, manage the revenue and facilitate the completions of sold units, land owners units and the unsold units in accordance with the terms and conditions of the JVA ...”; and D
- (v) clause 19, where the company agrees that the defendant shall have control, operations and management including revenue management of the project and shall carry out and complete all the development;
- (vi) clause 23, where it was agreed that the defendant “shall at its own costs and expense, complete the constructions and deliver vacant possession of the sold united, registered land owners units and the unsold units to their respective purchasers and registered land owners within the time described”; E
- (vii) clause 27, where the defendant will commence the construction of the buildings in the project at its own expense within 60 days from the date of the JVA “being endorsed by the court or any other dates suitable for the approval of the authorities”; and F
- (viii) clause 37, where the company authorised the defendant to take delivery of vacant possession of the project site and all constructed buildings from the date of the JVA. G

[67] For these reasons, this court finds that the company’s disposal of its property to the defendant pursuant to the JVA, amounts to a disposition of the property of the company after the presentation of the winding-up petition, without leave of the insolvency court, is in contravention of the s. 472(1) of CA 2016 and is accordingly, void. H

Is The JVA Void As An Undue Preference To The Directors Of The Company?

[68] Under cl. 22 of the JVA, the company is to be paid the sum of RM30,000 per month for its maintenance during the completion of the process of 30 months. I

A [69] However, instead of the company receiving the RM30,000 per month, it is the directors of the company who will be personally receiving the RM30,000 per month from the defendant.

B [70] The directors of the company will also be personally allocated 15% of the profits of the development or eight apartment units based on the price of RM400,000 per unit. This is evident in the letter dated 7 February 2020 (annexed as part of the JVA) from the defendant to the company, which states:

C 3. The Directors of GDSB [the company] will be allocated 15% of the profits of the development or 8 units based on assumed price of RM400,000.

4. The Directors will be paid in total RM30,000 per month for the duration of the project completion instead of RM40,000 that you request.

D [71] The directors of the company are unsecured creditors, and the remaining assets of the company must be distributed *pari passu* amongst its unsecured creditors. The agreement between the company and the defendant to pay the sum of RM30,000 per month for the duration of the completion of the project to the directors of the company and the allocation of 15% profit share of the project to the directors of the company, amounts to undue preference in favour of the directors under s. 528 of the CA 2016 (formerly s. 293 of the CA 1965). The payments and the profit share to the directors of the company contravenes the statutory insolvency regime under s. 527 of the CA 2016 (formerly s. 292 of the CA 1965).

F [72] As held by the Federal Court in *Dubon Bhd v. Wisma Cosway Management Corporation* [2020] 6 CLJ 589, per Nallini Pathmanathan FCJ:

[1] In the field of insolvency, the law on the rights of secured and unsecured creditors, as well as that relating to priorities and preference payments, is well-settled in statute, and consequently by case-law, which provides both certainty and judicial precedent.

G ...

[35] **Our rationale is borne out by s. 292 as well as the importance of the *pari passu* rule in insolvency in relation to unsecured creditors ...** In *Malaysian Trustees Bhd v. Transmile Group Bhd & Ors* [2012] 3 MLJ 679 the sanctity of the rule in insolvency law was expressed as follows:

H [22] The *pari passu* rule is the cornerstone of insolvency law. It is one of the most fundamental principles of the law of liquidation and is at the very heart of the whole statutory scheme of winding up. It is considered as the most universal of all insolvency principles. It is an old equitable principle that all persons similarly situated are entitled to equality in treatment in the distribution of the assets of the company in the process of liquidation (see *McPherson's Law of Company Liquidation* at para 13.100 at pp. 13-1051 and *Roy Good Principles of Corporate Insolvency Law* at p. 175 para 7.02) ...

I

[36] In *Transmile (supra)* the Court of Appeal went on to explain that s. 292(1) provides for the distribution of assets in winding up. The liquidator is obliged firstly to apply the available unencumbered assets to settle the preferential debts as statutorily provided for and secondly to pay the unsecured debts of the company *pari passu*. As such “debts of the same class shall rank equally between themselves and shall be paid in full, unless the property of the company is insufficient to meet them, in which case they shall abate in equal proportions between themselves”.

(emphasis added)

[73] Therefore, another reason the JVA is void is because of the undue preference given to the directors of the company.

Do The Terms Of The JVA Contravene The HDA?

[74] Section 8 of the HDA states that a licensed housing developer cannot enter into with an arrangement or agreement “to sell, transfer, assign, dispose of or reconstruct his business or management relating to housing development either by amalgamation or otherwise” without the approval of the Controller of Housing. Section 8(1) and (2) of the HDA states:

8. Arrangement or agreement affecting the business of a licensed housing developer

(1) Where a licensed housing developer proposes to enter into an arrangement or agreement to sell, transfer, assign, dispose of or reconstruct his business or management relating to housing development either by amalgamation or otherwise, the licensed housing developer shall as soon as possible notify the Controller of the proposed arrangement or agreement and unless approved by the Controller under subsection (2), the licensed housing developer shall not proceed with that arrangement or agreement.

(2) Where the Controller receives the notification of the proposed arrangement or agreement under subsection (1), the Controller may approve the arrangement or agreement or refuse to give approval thereto; and in approving the same he may impose thereon such conditions as he may deem fit and proper for the purpose of carrying into effect the provisions of this Act.

[75] The terms of the JVA, particularly in cls. 10, 15, 18 and 19, amount to an agreement between the company and the defendant for the company “to sell, transfer, assign, dispose of or reconstruct his business or management relating to housing development either by amalgamation or otherwise”.

[76] In breach of s. 8 of the HDA, the company did not notify the Controller of the proposed JVA with the defendant. It also did not seek or obtain the approval of the Controller of Housing prior to entering in the JVA with the defendant.

A [77] Pursuant to s. 5(1) of the HDA, only a housing developer licensed under the HDA can engage in, carry on, undertake or cause to be undertaken housing development.

(1) No housing development shall be engaged in, carried on, undertaken or caused to be undertaken except by a housing developer in possession of a licence issued under this Act.

B [78] Evident from the JVA, the defendant and the company had agreed that the defendant, among others, will “take over and complete the construction of the whole development” and “shall have control, operations and management including revenue management of the project and shall carry out and complete all the development”.

C [79] However, the defendant is not a licensed housing developer under the HDA. Therefore, the defendant taking over and completing the construction of the development is in breach of s. 5(1) of the HDA. As Anuar Zainal Abidin J (as he then was) held in *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd; Bhagat Singh Surain Singh & Ors (Intervenors)* [1996] 4 CLJ 52:

D It is clear from the above provisions that a housing developer must be in possession of a licence issued under the Act before it engages in carrying on or undertaking the housing development. This is an absolute prohibition.

E [80] Accordingly, this court finds that the JVA is in breach of the HDA given that (i) the company did not notify the Controller of Housing of the proposed JVA with the defendant; (ii) the company did not seek for and obtain the approval of the Controller of Housing prior to entering into the JVA with the defendant and (iii) the defendant is not a housing developer duly licensed under the HDA.

Decision

F [81] As discussed above, the defendant and the company had entered into the JVA in contravention of written law, namely the CA 2016 and the HDA.

[82] Additionally, the OS 725 was filed by the defendant in the Shah Alam High Court without leave of insolvency court, in contravention of s. 471(1) of CA 2016.

G [83] Moreover, as the company had been wound-up, only the liquidator has the power under Part I of the Twelfth Schedule of CA 2016 to defend the defendant’s action against the company. In this case the liquidator was neither made a party nor served with the cause papers in OS 725.

H [84] The JVA, which the Shah Alam High Court in OS 725 had declared as valid in its order contravenes the provisions of both the CA 2016 and the HDA; thus rendering the order in OS 725 defective and null and void on the grounds of illegality.

I

[85] Moreover, the Shah Alam High Court lacked the jurisdiction to hear OS 725 since the defendant did not seek leave of the insolvency court prior to commencing the action against the company in breach of s. 471(1) of CA 2016. The order in OS 725 is thus, void.

A

[86] Therefore, pursuant to the principles in *Badiaddin v. Arab Malaysian Finance (supra)*, this court is afforded the basis to set aside the order in OS 725 *ex debito justitiae*.

B

[87] Accordingly, the order in OS in OS 725 is hereby set aside.

[88] The defendant is ordered to cease with the construction of the project and to deliver the project to the plaintiff.

C

[89] It is hereby declared that the JVA between the defendant and the company is null and void and that the defendant does not have any interests in the land.

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